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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. OSCAR ENRIQUE SANTOS, Defendant and Appellant.	B238362 (Los Angeles County Super. Ct. No. BA366770)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed with directions.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Oscar Enrique Santos challenges his convictions for sexual offenses against two victims. He maintains that there was insufficient evidence to support his convictions with respect to one victim, and that he received ineffective assistance from his counsel. In addition, he contends the abstract of judgment does not accurately reflect his convictions. We reject appellant's challenges to his convictions, but conclude that the abstract of judgment contains an error. We therefore affirm the convictions, and direct that the abstract of judgment be corrected.

PROCEDURAL BACKGROUND

On June 15, 2011, an amended information was filed, alleging that appellant committed sexual offenses involving two victims, E.P. and J.G. Regarding E.P., the information charged appellant under counts 1 and 3 with sexual battery by restraint (Pen. Code, § 243.4, subd. (a)) and under count 2 with sexual penetration with a foreign object (Pen. Code § 289, subd. (a)(1)).[1] Regarding J.G., the information charged appellant under counts 4 through 12 with oral copulation of an incompetent person (§ 288a, subd. (g)), and under counts 13 through 21 with oral copulation of a person under 18 years of age (§ 288a, subd. (b)(1)). Appellant pleaded not guilty.

A jury found appellant guilty as charged under counts 1, 3, 4, and 13. Regarding the remaining counts, the jury found appellant guilty of the lesser offenses of attempted sexual penetration with a foreign object (count 2), attempted oral copulation of an incompetent person (counts 5 through 12), and attempted oral copulation of a person under 18 years of age (counts 14 through 21). On January 19, 2012, the trial court sentenced appellant to a total term of 18 years in prison.

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[1] All further statutory citations are to the Penal Code, unless otherwise indicated.

FACTS

A. *Prosecution Evidence*

1. *Background*

In the 2005-2006 and 2006-2007 academic years, appellant was employed at Garfield High School as a health care assistant. He was assigned as a "one-on-one" to a wheelchair-bound student named Ruben, who took special classes intended to teach living skills. Appellant was responsible for feeding Ruben and changing his diapers.

2. *Offenses Against E.P.*

In 2005 and 2006, Louanne Estrada was the director of the Victory Outreach Boyle Heights Women's Home. During that period, C.P. and her daughter, E.P. lived in the home. Both were unable to live independently, as they shared a mental deficiency that affected their memory. As a result of the deficiency, E.P. had difficulties remembering phone numbers and the directions to locations. From November 2005 to April 2006, she was a student at Garfield High School, where she took the same classes as Ruben.

E.P. attended Garfield High School when she was 17 years old. She testified that she knew appellant as a staff member who took care of another student in a wheelchair who "wasn't all there and . . . didn't speak." E.P. sometimes used elevators within the school to go to her classes. Although she lacked the key needed to operate the elevators, appellant had a key.

E.P. further testified that on one occasion, appellant engaged in misconduct with her in an elevator. After she entered the elevator with appellant and the student in the wheelchair, appellant "press[ed] the numbers up and down." Appellant pushed her against the elevator wall, gave her a French kiss (that is, kissed her "[t]ongue to tongue"), touched her breasts under her bra, and put his

finger "on her private part" underneath her jeans. Later, appellant pulled down her jeans and "put his dick in [her]." During this activity, the student in the wheelchair was against the opposite wall, facing E.P.[2] E.P. reported the incident to several people, including her mother C.P. and a teacher, Daniel Martinez.

In early January 2006, after C.P. related the incident to Estrada, E.P. met with Laura Alvarado, an assistant principal at Garfield High School. E.P. told Alvarado that appellant had kissed her while they were in an elevator. After determining that the incident occurred on or about December 21, 2005, Alvarado filed a suspected child abuse report with the Los Angeles County Sheriff's Department. Deputy sheriffs made a preliminary investigation of the incident and forwarded a report to the Special Victims Bureau (SVB), assigned to investigate the physical and sexual abuse of children, but the report never arrived at the SVB.

3. *Uncharged Incident Involving R.P.*

In the fall of 2006, R.P. attended Garfield High School. She was then 16 or 17 years old. She had been assessed as a person with mental retardation, and was enrolled in the special education program.

R.P. testified that appellant stared at her and told her that she "smell[ed] good." One day, as she and a friend were leaving the school to go home, appellant grabbed her backpack as he pushed Ruben in his wheelchair. Appellant then invited R.P. to enter a school elevator. She felt uncomfortable and refused. Appellant asked R.P. not to tell anyone about his request, explaining that he could lose his job. R.P. related the incident to her mother, H.P. Afterward, appellant

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[2] E.P. stated that although a "one-on-one" had been assigned to help her, the one-on-one was not present in the elevator. She also testified that from time to time, the elevator stopped and its doors opened. After one stop, a woman entered and briefly rode the elevator. According to E.P., appellant resumed his misconduct after the woman left the elevator.

confronted R.P. during a school nutrition break, asked why she had made a complaint regarding him, and denied the misconduct.

H.P. testified that when she reported the incident to school officials, she was told that appellant would be asked to stay away from R.P. Later, in February 2007, H.P. complained to the school that appellant continued to appear near R.P. and sometimes entered her classroom.

4. *Offenses Against J.G.*

J.G. had spina bifida and used a wheelchair. She had been assessed as operating at a level above mental retardation and below "borderline" intellectual functioning. J.G.attended Garfield High School when she was 16 and 17 years old. In 2007, she took special classes in English, math, history, and science. Because the school had several floors, she relied on the elevators to get to class. She had her own elevator key.

J.G.testified that she used the elevator with appellant and Ruben. On more than 10 occasions, appellant touched her "all over [her] body"; in addition, he hugged and kissed her, and made her touch his penis with her hands. She also testified that he repeatedly tried to place his penis into her mouth, but she refused to let him do so. According to J.G., she saw his penis emit a yellow fluid. During these events, Ruben faced an elevator wall.

A.R. was a student in a "mainstream" class with J.G.at Garfield High School. In November 2007, during the class, J.G.gave A.R. a note that stated: "[T]here is a young man who works here at the school . . . . [¶] The thing is the young man loves me[,] I think, but I love him and I do not know how to tell him. How can I tell him that I love him? [¶] . . . [W]hen we [*sic*] see him in the elevator, he embraces me and kisses me and he tells me that he loves me, but I cannot tell him that I love him. Please help me. How do I tell him?"

A.R. understood the note to refer to appellant. In reply, A.R. wrote on the note: "You need to say something because he is a married gentleman. What is his name? Is he the same one that I am thinking of?" They then corresponded by passing the note and adding remarks to it. J.G.asked A.R. not to tell anyone about the "young man," and A.R. urged her "to speak" because he was married, older than J.G., and "taking advantage."

A.R. brought the note to the attention of Barbara Torres, an assistant in the special education program, and William Bazadier, an assistant principal responsible for the special education program. Bazadier interviewed J.G.regarding the note. She initially denied that it was truthful, but soon stated that she was in love with appellant. Bazadier reported the conduct described in the note to the Los Angeles County Sheriff's Department.

5. *Investigation*

In November 2007, deputy sheriffs investigated the complaint regarding J.G., and forwarded their initial report to SVB. On December 19, 2007, SVB Detective Patrick Martinez contacted J.G. According to Martinez, J.G.initially refused to speak to him. Later, she stated that appellant had kissed her in an elevator, but asked Martinez to stop his investigation because she liked appellant and did not want to get him into trouble.

Shortly afterward, Martinez discovered E.P.'s allegations of misconduct, and he interviewed her. According to Martinez, E.P. said that while she and appellant shared an elevator, he "French kissed" her, touched her breasts, and inserted a finger into her vagina. E.P. also identified appellant in a photographic line up.

On January 30, 2008, Martinez went to the Los Angeles Unified School District headquarters to talk to appellant, who repeatedly denied that he had engaged in misconduct with E.P., invited R.P. into an elevator, and kissed J.G.

Martinez arrested appellant and transported him to a Sheriff's Department station. As they travelled to the station, appellant told Martinez that he wanted to "tell [him] the truth . . . ."

At the station, Martinez interviewed appellant, who waived his *Miranda* rights.[3] Appellant asserted that he "never had . . . anything to do with [R.P]," but acknowledged "a couple of weak times in [his] life" regarding E.P. and J.G. He stated that while he and E.P. were in the elevator, he gave her a French kiss and touched her breast, but stopped when he realized, "I'm a teacher and you're a student." He denied placing his hands in E.P.'s vaginal area. Appellant also said that on one occasion in an elevator, J.G.became emotional when she described a problem with her mother. To comfort her, he hugged her, and briefly gave her a "tongue kiss."[4]

In January 2010, Martinez again interviewed J.G., who was to be a witness in a trial of charges alleged against appellant in connection with E.P. J.G.initially told Martinez that she did not want to testify. However, after Martinez showed J.G.the note that she had passed to A.R., J.G.said that "there was more to it" than described in the note. J.G.stated that while she and appellant were in the elevator, Ruben faced a wall. On multiple occasions, appellant gave her "open mouth[ed]" kisses and touched her under her clothing. He touched her body with his penis, and made her handle it. He also placed his penis in her mouth, and removed it before it produced a fluid, which he wiped on his shirt.

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3 *Miranda v. Arizona* (1966) 384 U.S. 436.

4 An audio recording of the interview was submitted to the jury.

B. *Defense Evidence*

Appellant, who testified on his own behalf, denied any misconduct regarding E.P., J.G., and R.P. Regarding E.P., he stated that on one occasion in a classroom, she asked him for a massage when he rubbed another assistant's aching neck. He denied her request. Regarding J.G., he testified that he once gave her a brief hug when she celebrated her quinceanera. According to appellant, he had no interactions with R.P.

Appellant further testified that his admissions of misconduct to Detective Martinez were the product of threats. According to appellant, when Martinez arrested him, he did not transport appellant directly to the Sheriff's Department station, but stopped for a period near a park that appellant did not recognize. Martinez then told appellant that he intended to take away his children and prevent him from obtaining resident alien status. Martinez also said that child abusers are raped, killed, or beaten up in jail. Martinez assured appellant that acknowledging some misconduct would give him a "way out." Later, at the station, appellant made the admissions that Martinez suggested.

Daniel Martinez testified that in 2005 and 2006, he was employed as a special education teacher at Garfield High School. He denied that E.P. ever reported misconduct by appellant to him.

Heidi Hishaw testified that in December 2005, she was temporarily assigned to E.P. as a one-on-one for two consecutive days. On the first day, Hishaw accompanied E.P. the entire day. The following day, a man entered the Garfield High School campus and asked Hishaw, "Where the hell is Oscar?" Hishaw directed the man to a teacher. Hishaw believed that the man was associated with E.P.'s residence because he later took E.P. home in a van. Hishaw also testified

that she once overheard E.P. ask appellant for a kiss while both were located in a classroom. According to Hishaw, appellant declined to do so.[5]

C. *Rebuttal*

Detective Martinez testified that he took a direct route to the Sheriff's Department station after he arrested appellant. According to Detective Martinez, he discussed only standard booking information with appellant during the drive.[6]

DISCUSSION

Appellant contends there was insufficient evidence to support his convictions regarding the offenses against J.G., and that he received ineffective assistance of counsel. In addition, he contends the abstract of judgment incorrectly reflects his convictions. For the reasons discussed below, we reject his contentions, with the exception of his challenge to the abstract of judgment.

A. *Sufficiency of the Evidence Regarding the Offenses Involving J.G.*

Appellant contends his convictions for the offenses involving J.G.fail for want of substantial evidence. He argues that J.G."gave numerous conflicting, confusing, and inconsistent versions of the claimed events occurring . . . in the elevator . . . that . . . amount to no evidence at all."

1. *Standard of Review*

Generally, "'[t]he proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact

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5 In addition to these witnesses, defense investigator Jesus Morrell testified that he had located two parks near the Sheriff's Department station where Detective Martinez interviewed appellant.

6 Detective Martinez also testified that appellant's ordinary route from his workplace to his home went past the two parks identified by Morell.

could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Under these principles, the testimony of a single witness is ordinarily sufficient to uphold a judgment "even if it is contradicted by other evidence, inconsistent or false as to other portions. [Citations.]" (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 366.) The circumstances in which an appellate court may properly decline to credit testimony are exceptional and rare. (*People v. Ennis* (2010) 190 Cal.App.4th 721, 728-732 (*Ennis*).) "'Testimony may be rejected only when it is inherently improbable or incredible, i.e., "'unbelievable per se,'" physically impossible or "'wholly unacceptable to reasonable minds.'"' [Citation.]" (*Id*. at p. 729, quoting *Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.)

2. *Appellant's Contentions*

Appellant challenges J.G.'s testimony on several grounds. His principal contention is that J.G.'s pre-trial accounts of his misconduct differed from her testimony at trial. He also argues that J.G.'s testimony was internally inconsistent,

and that it was "entirely unbelievable" because many people used the school elevators. As explained below, we reject the contentions.[7]

a. *Pretrial Accounts of Appellant's Misconduct*

Appellant maintains that the differences between J.G.'s pre-trial descriptions of appellant's misconduct and her trial testimony mandate the rejection of that testimony. We disagree.

Regarding J.G.'s pre-trial statements, Detective Martinez testified that when he first contacted her in December 2007, J.G.said only that appellant had kissed her in an elevator. Later, on January 7, 2010, Martinez interviewed J.G.in her home regarding her impending testimony in a trial of charges alleged against appellant in connection with E.P. When Martinez showed J.G.a copy of the note that she had passed to A.R., J.G.became nervous and said that "there was more to it." J.G.stated when she and appellant were in the elevator, appellant gave her "open mouth[ed]" kisses, touched her under her clothing, made her touch his penis, and also placed his penis in her mouth. She also mentioned someone named "Oscar" who had driven her to a house for purposes of sex.

On January 9, 2010, Detective Martinez interviewed J.G.at a Sheriff's Department station. There, she reaffirmed the January 7, 2010 account of appellant's misconduct in the elevator. When he asked her to clarify the incident at the house, she said that it involved "somebody else" named Oscar. In addition, she stated that she "would agree to have sexual conduct" with her boyfriend, J.R.

During the underlying trial, J.G.'s account of appellant's misconduct in the elevator closely tracked the descriptions that she provided to Detective Martinez in

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[7] To the extent appellant's contentions may assume that J.G.'s testimony must be rejected because she suffers from developmental disabilities, we reject that assumption in our analysis of the contentions. (*People v. Catley* (2007) 148 Cal.App.4th 500, 506-508.)

January 2010, although she maintained -- with exceptions that we note below (see pt. A.2.b., *post*) -- that she never permitted him to place his penis fully in her mouth. Regarding her December 2007 statements to Martinez, she stated that she had concealed appellant's misconduct because she did not want to get him into trouble. Regarding her January 2010 statements to Martinez, she stated that the "Oscar" who drove her to the house was not appellant, but the driver of a car service who provided her with transportation and tried to take advantage of her. In addition, she denied that the "Oscar" who drove her to the house was J.R. because she did not know J.R. when the incident occurred.

The differences between J.G.'s pre-trial statements and her trial testimony do not warrant the rejection of that testimony. The fact that a victim of sexual abuse initially denied or minimized the scope of the abuse prior to trial does not discredit the victim's trial testimony regarding the abuse, for purposes of review for the existence of substantial evidence. (*Ennis*, *supra*, 190 Cal.App.4th at pp. 728-732; *In re S.A.* (2010) 182 Cal.App.4th 1128, 1140-1150 (*S.A.*).) Furthermore, the fact that J.G.testified that appellant attempted -- but did not complete -- the act of oral copulation, in contrast with her pre-trial statements, does not nullify the status of her testimony as substantial evidence. (See *In re Sheila B.* (1993) 19 Cal.App.4th 187, 198-200.)

b. *Purported Inconsistencies In J.G.'s Testimony*

Appellant also asserts that internal inconsistencies in J.G.'s testimony render it incapable of supporting the judgment. He is mistaken. As our Supreme Court has explained, even internally inconsistent testimony from a single witness may support a judgment. (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 878.) "It is for the trier of fact to consider internal inconsistencies in testimony, to

resolve them if this is possible, and to determine what weight should be given to such testimony." (*Ibid*.)

During J.G.'s direct examination, she initially denied that appellant took his penis out of his pants, but later testified that he repeatedly tried to place his penis into her mouth. In addition, although J.G.generally denied that she permitted appellant to put his penis in her mouth, she sometimes stated that her January 2010 statements to Detective Martinez were true. Furthermore, on cross-examination, J.G.appeared to state that appellant's only episode of misconduct occurred shortly before she wrote the note to A.R., during which appellant merely hugged and kissed her. However, during the prosecutor's re-direct examination, she testified as follows:

"[Prosecutor:] . . . The way you answered made me think that the guy in the elevator only ever kissed you one single time and that's it. Is that correct or is that wrong? [¶] . . . [¶]

"[J.G.:] . . . [W]hen I was in school, *he was touching me every single day*.

"[Prosecutor:] It happened more than one time?

"[J.G.:] Yes.

"[Prosecutor:] And it was more than just kissing?

"[J.G.:] It was just touching me and then just kiss [*sic*] once, that's it.

"[Prosecutor:] So when you were telling Detective Martinez at the house that he did things to you and it happened while you were 17, the whole year, was that the truth?

"[J.G.:] *Yes*." (Italics added.)

We see nothing in J.G.'s testimony that renders it incapable of supporting appellant's convictions, as the purported inconsistencies were reasonably attributable to J.G.'s reluctance to describe conduct that she regarded as improper or a failure to understand questions. In this regard, her testimony concerning the

incident preceding her note may be understood to mean that it was the only episode in which appellant "just" hugged and kissed her. The inconsistencies thus went to J.G.'s credibility and the weight assignable to her testimony, which were for the jury to decide. (*S.A.*, *supra*, 182 Cal.App.4th at pp. 1149-1150.)

People v. Casillas (1943) 60 Cal.App.2d 785, upon which appellant relies, is distinguishable. There, the defendant was charged with rape and incest with respect to his minor daughter, who had given birth to a son. (*Id.* at pp. 787-789.) During the bench trial, the daughter repeatedly changed her testimony regarding her son's father. (*Id*. at pp. 788-792.) On direct examination, she stated that the defendant had engaged in sexual intercourse with her on two occasions; on cross-examination, she stated that the baby's father was a boy named Manuel, and denied any sexual relations with the defendant; later, on re-direct examination, she stated that she had sex with both the defendant and Manuel. (*Id*. at pp. 788-793.) The appellate court concluded that the daughter's testimony did not constitute substantial evidence to support the defendant's conviction, reasoning that she gave "three separate, distinct and contradictory versions as to who ravished her and the circumstances surrounding the commission of the offenses." (*Id*. at p. 794.) In contrast, no inconsistencies of that magnitude appear in J.G.'s testimony.[8]

c. *Misconduct Within Elevator*

Appellant contends that J.G.'s testimony does not constitute substantial evidence because her account of appellant's misconduct was "entirely unbelievable." In exceptional circumstances, the testimony of a witness may be

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8 In a related contention, appellant argues that the trial court improperly overruled his objection to the relevancy of a remark by J.G. that he "should be in jail" for his conduct. However, as the record discloses no reasonable likelihood of a more favorable outcome for appellant had the objection been sustained, the error (if any) was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

rejected when it is physically impossible or obviously false "without resorting to inferences or deductions." (*People v. Huston* (1943) 21 Cal.2d 690, 693, reversed on another ground in *People v. Burton* (1961) 55 Cal.2d 328, 352.) Appellant argues: "[JG.] claims that the incidents happened during school hours in elevators used by numerous people, including faculty and other wheelchair-bound students with their one-on-ones. . . . Moreover, the time between classes was only about six or seven minutes and if a student was tardy for class, it would be noted. . . ." For the reasons discussed below, appellant's contention fails, as J.G.'s account was neither physically impossible nor false on its face.

During closing arguments, the prosecutor offered a theory regarding how appellant secured an adequate opportunity to abuse J.G. in the elevator. The prosecutor acknowledged that there was no evidence that appellant's elevator key enabled him to lock the elevator's doors while he, Ruben, and J.G. occupied it. The prosecutor argued instead that appellant repeatedly pressed the elevator buttons to keep it moving, and positioned Ruben so that bypassers noticed only him when the elevator doors opened. She also argued that the school's "rhythm" included relatively quiet periods following class breaks when the students were in their classrooms and the administrators were in their offices.

The record discloses sufficient evidence to support this theory. The elevator in which the misconduct occurred was located between two adjoining buildings, the main administration building and a building housing the special education program. The elevator served three floors and had two sets of doors, allowing individuals to enter on one side and leave on the opposite side. A key was needed to use the elevator. According to J.G., the only students with access to the elevator were those in wheelchairs. Generally, the breaks between classes were six or seven minutes, and teachers were required to mark students as tardy or absent when they failed to make a timely appearance in an assigned classroom.

According to assistant principal Bazadier, J.G.'s 2007 attendance records were "littered with absences and tardies." This evidence was adequate to support the reasonable inference that appellant abused J.G. by waiting until class breaks ended and positioning Ruben to hide his misconduct.

Appellant's reliance on *People v. Headlee* (1941) 18 Cal.2d 266 and *People v. Carvalho* (1952) 112 Cal.App.2d 482 is misplaced. In each case, the reviewing court rejected the purported victim's testimony that she had been kidnapped because she did not attempt to escape, even though the evidence unequivocally showed that she could have done so. (*People v. Headlee*, *supra*, 18 Cal.2d at pp. 273-274 ["No effort was made . . . to . . . attempt an escape . . . . This is not the conduct of a person who has been kidnapped . . . . "]; *People v. Carvalho*, *supra*, 112 Cal.App.2d at p. 489 [concluding that the alleged victim's conduct was "totally at variance with the usual and ordinary conduct of one who is the victim of kidnapping[]"].) In contrast, J.G.'s testimony presented no such implausible event. In sum, there was sufficient evidence to support appellant's convictions for the offenses against J.G.

B. *Ineffective Assistance of Counsel*

Appellant contends his trial counsel rendered ineffective assistance by failing to (1) object to evidence regarding Detective Martinez's interview with Ruben, (2) ensure that an admonition was given regarding a stricken portion of Martinez's testimony, and (3) object to a portion of the prosecutor's reference to Ruben during closing arguments. For the reasons explained below, we reject these contentions.

1. *Governing Principles*

"In order to demonstrate ineffective assistance of counsel, a defendant must

first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citations.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 357.)

2. *Underlying Proceedings*

On January 30, 2008, after Detective Martinez talked to Ruben, he interviewed appellant twice. During the first interview, Martinez described his meetings with Ruben to appellant, who repeatedly denied any misconduct with E.P. and J.G. Martinez arrested appellant and transported him to a Sheriff's Department station, where appellant admitted some misconduct concerning E.P. and J.G.

During pre-trial proceedings, the prosecutor requested a ruling regarding whether she would be permitted to play a redacted audio recording of the first interview, in addition to the audio recording of the second interview. She argued that appellant made the "minimized admissions" during the second interview because he had been "confronted by the statements from Ruben" during the first interview. Defense counsel replied that the second interview showed that Detective Martinez's references to Ruben did not prompt appellant's admissions. He argued that during the second interview, appellant made his admissions before Martinez referred to Ruben. The trial court deferred ruling on the admissibility of the first interview until it had reviewed the transcript of that interview.

Later, shortly before the trial, the prosecutor offered to forego presenting the first interview, provided that she would be permitted to submit the second interview, with no further redactions. In response, defense counsel maintained that Martinez extracted the admissions during the second interview through deceptive tactics, and indicated that appellant intended to testify that he engaged in no misconduct with E.P. or J.G. Defense counsel further stated that he could show that appellant denied any misconduct during the first interview through his cross-examination of Martinez. The trial court ruled that the audio recording of the first interview would not be played for the jury unless it became relevant.

Ruben did not testify at trial. During the direct examination of Detective Martinez, the prosecutor inquired regarding the events preceding his January 30, 2008 interviews of appellant. The following questioning occurred:

"[Prosecutor:] Prior to January 30[,] 2008, had you made contact with Ruben?

"[Detective Martinez:] Yes.

"[Prosecutor:] Okay. Were you able to interview him?

"[Detective Martinez:] Yes.

"[Prosecutor:] How did you interview him?

"[Detective Martinez:] The first day I interviewed him, it took a while. . . . Ruben has his faculties. . . . [¶] . . . [¶] He's in a wheelchair. He[] can't move. He has a tracheotomy. He feeds through another tube into his abdomen area. He cannot speak. He cannot write. He cannot communicate other than moving his eyes up and down for 'yes' and to the side for 'no.' *That interview I asked him if anything occurred, something did occur.*"

"[Prosecutor:] Let's not get into the substance of the interview, but the fact is that you did ask him questions?

"[Detective Martinez:] Yes.

"[Prosecutor:] And saw answers?

"[Prosecutor:] Yes." (Italics added.)

Defense counsel objected to Detective Martinez's remark that "something did occur," asked the court to strike the remark, and requested that the jury be instructed to disregard it. The court sustained the objection and struck the remark, but did not immediately admonish the jury to disregard it.

Shortly afterward, in response to the prosecutor's questions, Detective Martinez testified that on January 30, 2008, before appellant made his admissions of misconduct at the Sheriff's Department station, he told appellant that he had spoken to Ruben. The prosecutor then played an audio recording of the interview at the Sheriff's Department station. The recording disclosed that appellant admitted some misconduct involving J.G. and E.P., but denied that he touched E.P.'s vaginal area. Following that denial, the following dialogue occurred between appellant and Detective Martinez:

"[Detective Martinez:] Why would [E.P.] tell me all the truth about the kissing and everything and tell me about you going down there with your hand and why would you deny it . . . ?

"[Appellant:] I'm telling you the truth.

"[Detective Martinez:] She's not . . . lying to me about this stuff. Okay? *R[]uben wasn't lying, correct?*

"[Appellant:] *No, R[]uben wasn't lying*.

"[Detective Martinez:] Okay.[E.P.]'s not lying about it because she told me what happened in the elevator with R[]uben there. Okay? And she's told me the whole truth about it. Why would you not tell me the whole truth about it and be done with it?

"[Appellant:] . . . [L]ike I said, I never put my hands inside her pants or inside her blouse. If I did touch her, it was on top of her clothes." (Italics added.)

Following the presentation of evidence, the trial court instructed the jury with CALJIC No. 1.02, which states in pertinent part: "Do not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken by the court; treat it as though you had never heard of it."

During closing arguments, defense counsel urged the jury to disregard appellant's January 30, 2008 admissions because they resulted from coercive and deceptive tactics. He noted that appellant's admissions occurred at the beginning of the second interview, immediately after Detective Martinez asked whether appellant had something to say.

In reply, the prosecutor described appellant as a "guilty man" who tailored his admissions to provide only a "minimal version of the truth," arguing that appellant knew from his first interview with Detective Martinez that J.G. had not yet fully divulged his misconduct, and that Ruben was a potential witness to that misconduct. According to the prosecutor, appellant reasoned thus: "[J.P.] hasn't said everything yet. She still has feelings for me, but Ruben was in that elevator. I need to shut this down. I don't want any more questions being asked. I'm good with what the detective thinks he knows." The prosecutor continued: "At that point [appellant] knew more about what happened. He knew [that] Ruben knew more about what happened than Detective Martinez knew at that moment . . . when they arrived at [the Deputy Sheriff's] station.

Later, the prosecutor contended that appellant took advantage of the "rhythm" of Garfield High School, arguing that his misconduct occurred during quiet periods following class breaks. The prosecutor maintained that following the class breaks, the students were generally "where they [were] supposed to be," with the exception of two students, "Ruben and somebody else who didn't need to be in that elevator . . . ."

3. *Evidence Regarding Interviews with Ruben*

Appellant contends defense counsel rendered ineffective assistance in failing to object to (1) Detective Martinez's testimony that he interviewed Ruben, and (2) the reference of Ruben in the italicized portion of Detective Martinez's interview with appellant. We disagree.

Generally, "[c]ounsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile." (*People v. Price* (1991) 1 Cal.4th 324, 387.) Furthermore, regarding tactical decisions such as objecting to evidence, no showing of ineffective assistance is made "when the record does not establish why counsel . . . failed to act in the manner challenged, unless counsel was asked at trial for an explanation and failed to provide one, or unless there could be no satisfactory explanation." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1037.) This is because ineffective assistance is established only when counsel's acts cannot be explained on the basis of any knowledgeable choice of tactics. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 501.)

Appellant maintains that Detective Martinez's testimony regarding his interviews with Ruben was inadmissible as irrelevant because it lacked "any tendency in reason to prove or disprove any disputed fact . . . ." (Evid. Code, § 210). We reject this contention. The evidence was offered to support the prosecutor's theory that appellant's knowledge of Martinez's interviews with Ruben prompted his admissions. Because defense counsel stated during the pretrial proceedings that appellant intended to testify that Martinez coerced his admissions, the prosecutor was entitled to present evidence supporting that theory in anticipation of appellant's expected defense. Moreover, as appellant did, in fact, testify that Martinez's coercive conduct motivated his admissions, the evidence regarding Martinez's interview with Ruben was relevant to a material disputed

fact. For this reason, defense counsel reasonably declined to object to the evidence.

Appellant also argues that "the reference to Ruben . . . during [the] recorded interrogation should have been redacted as no evidence of what Ruben may have told Martinez was admitted at trial." However, the record does not foreclose a satisfactory explanation for defense counsel's decision not to object, even though it does not specify the remarks to which Martinez referred in asking, "R[]uben wasn't lying, correct?" The italicized portion of the interview was potentially admissible as an adoptive admission by appellant, for purposes of the hearsay rule. (*People v. Davis* (2005) 36 Cal.4th 510, 535; see *Brown v. Surety Co. of Pacific* (1981) 122 Cal.App.3d 614, 618-619 [defendant's acknowledgment that accusations against him by third parties were true was admissible adoptive admission].)[9] For this reason, if defense counsel had objected on the ground that no evidence regarding Ruben's remarks had been presented, the prosecutor would have been entitled to try to establish those remarks by examining Martinez or presenting portions of his first interview with appellant. As the remarks were potentially harmful to appellant's defense, defense counsel may have decided not to open the door to their admission. In addition, because Martinez's reference to Ruben occurred after appellant made his admissions, defense counsel may have believed that the reference underscored his theory that Martinez's improper tactics motivated the admissions. In sum, appellant has shown no ineffective assistance of counsel in connection with the pertinent items of evidence.

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9 Generally, "[a] statement by someone other than the defendant is admissible as an adoptive admission if the defendant 'with knowledge of the content thereof, has by words or other conduct manifested his adoption [of] or his belief in its truth.' [Citations]." (*People v. Davis*, *supra*, 36 Cal.4th at p. 535.)

4. *Admonition*

Appellant asserts that his counsel rendered ineffective assistance by failing to secure an admonition immediately after the trial court struck Detective Martinez's remark that "something did occur." This contention fails, as the court issued an appropriate admonition in instructing the jury. We presume the jury followed this instruction. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

5. *Prosecutor's Closing Argument*

Appellant contends his counsel was ineffective because he raised no objections to the prosecutor's references to Ruben during her closing argument. We disagree. In closing arguments, prosecutors may properly urge the jury to accept a theory logically inferred from the evidence. (*People v. Huggins* (2006) 38 Cal.4th 175, 207.) That is what occurred here.

Regarding appellant's claim that Detective Martinez coerced his January 30, 2008 admissions, the prosecutor argued that after appellant learned that Martinez had met with Ruben, appellant tailored his admissions to "shut . . . down" the investigation before Martinez discovered the full scope of appellant's misconduct. In developing this theory, the prosecutor relied solely on properly admitted evidence showing that Ruben was present in the elevator with appellant, that Martinez interviewed Ruben, and that appellant was aware of that interview. That evidence also supported the prosecutor's argument that appellant took advantage of the school's "rhythm." As the prosecutor's remarks did not stray beyond the evidence correctly admitted at trial, defense counsel had no meritorious ground to object to them. In sum, appellant has failed to show ineffective assistance of counsel.

C. *Abstract of Judgment*

Appellant contends the abstract of judgment incorrectly states that his conviction under count 2 was for "SEXUAL PENTRATE BY FOR OBJ" [*sic*], rather than for attempted forcible sexual penetration by a foreign object. Respondent agrees that the notation on the abstract of judgment does not accurately describe appellant's conviction. We conclude that the abstract of judgment must be modified to avoid confusion regarding appellant's conviction under count 2.

DISPOSITION

The judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment accurately reflecting that appellant's conviction under count 2 is for attempted sexual penetration with a foreign object (§§ 289, subd. (a)(1), 664), and to forward a copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.